

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|-------------------------------------|---|-----------------------------|
| LUPITA M. LOPEZ |) | |
| Claimant |) | |
| |) | |
| VS. |) | |
| |) | |
| DEAN & DELUCA, INC. |) | |
| Respondent |) | Docket No. 1,041,719 |
| |) | |
| AND |) | |
| |) | |
| FEDERAL INSURANCE CO. |) | |
| LIBERTY MUTUAL FIRE INS. CO. |) | |
| Insurance Carriers |) | |

ORDER

This is a dispute between respondent's insurance carriers. Respondent and Federal Insurance Company (Federal) request review of the October 21, 2008 preliminary hearing Order entered by Administrative Law Judge Nelsonna Potts Barnes.

ISSUES

Claimant alleged she suffered a series of repetitive injuries each and every working day while employed by the respondent. The alleged series of accidents extended through a period of time when Liberty Mutual Insurance Company (Liberty) and Federal had each provided workers compensation insurance coverage for respondent.

The Administrative Law Judge (ALJ) found Federal liable for claimant's medical treatment and temporary total disability compensation if taken off work by the authorized treating physician.

Federal contends Judge Barnes erred. Federal contends claimant's accident occurred before their insurance coverage commenced on October 1, 2007. Therefore, Federal argues it should be released from paying any part of claimant's medical expenses.

Conversely, Liberty and claimant disagree with Federal's analysis. They point out that claimant continued to work and experienced progressively worsening symptoms. They request the Board to affirm the October 21, 2008 Order.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the whole evidentiary record filed herein, this Board Member makes the following findings of fact and conclusions of law:

This appeal should be dismissed as the Board does not have the jurisdiction to review the issue now presented by Federal in an appeal from a preliminary hearing order.

The parties have raised the question whether claimant's injury occurred during the period that Liberty Mutual provided respondent with workers compensation insurance coverage or during the period that Federal provided that insurance coverage, or during both periods. Accordingly, the issue now presented to the Board is what is claimant's date of accident for purposes of determining liability between respondent's insurance carriers, an issue which the Board does not have jurisdiction to review from a preliminary hearing order.

In appeals from preliminary hearing orders, the Board does not have jurisdiction to review every alleged error in fact or in law. In preliminary hearing matters, the Board's jurisdiction is specifically limited by K.S.A. 44-534a to the following issues, which are deemed jurisdictional:

- (1) Did the worker sustain an accidental injury?
- (2) Did the worker's accidental injury arise out of and in the course of employment?
- (3) Did the worker provide the employer with both timely notice of the accidental injury and timely written claim?
- (4) Are there any defenses that will defeat the compensability of the claim?

K.S.A. 44-534a(a)(2) provides, in part:

. . . A finding with regard to a disputed issue of whether the employee suffered an accidental injury, whether the injury arose out of and in the course of the employee's employment, whether notice is given or claim timely made, or whether certain defenses apply, shall be considered jurisdictional, and subject to review by the board. Such review by the board shall not be subject to judicial review. . . . Except as provided in this section, no such preliminary findings or preliminary awards shall be appealable by any party to the proceedings, and the same shall not be binding in a full hearing on the claim, but shall be subject to a full presentation of the facts.

Additionally, the Board may review other preliminary hearing awards when a judge exceeds his or her jurisdiction. That authority is provided in K.S.A. 44-551(b)(2)(A), which provides, in part:

If an administrative law judge has entered a preliminary award under K.S.A. 44-534a and amendments thereto, a review by the board shall not be conducted under this section unless it is alleged that the administrative law judge exceeded the administrative law judge's jurisdiction in granting or denying the relief requested at the preliminary hearing. . . .¹

But the administrative law judges have the jurisdiction at the preliminary hearing stage to decide medical compensation questions.² And the judge has the jurisdiction to decide those questions rightly or wrongly.

Jurisdiction is defined as the power of a court to hear and decide a matter. The test of jurisdiction is not a correct decision but a right to enter upon inquiry and make a decision. Jurisdiction is not limited to the power to decide a case rightly, but includes the power to decide it wrongly.³

As the date of accident for purposes of determining liability among an employer's various insurance carriers is not an issue that the Board has the authority to review from a preliminary hearing order, Federal's appeal should be dismissed. This Board Member finds that this matter should be dismissed and the Order of the ALJ remains in full force and effect.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁴ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2007 Supp. 44-551(i)(2)(A), as opposed to being determined by the entire Board when the appeal is from a final order.⁵

WHEREFORE, it is the finding of this Board Member that the Order of Administrative Law Judge Nelsonna Potts Barnes dated October 21, 2008, remains in full force and effect and the appeal of respondent and its insurance carrier, Federal Insurance Company, in the above matter should be, and is hereby, dismissed.

¹ K.S.A. 2001 Supp. 44-551.

² K.S.A. 44-534a(a)(2).

³ *Allen v. Craig*, 1 Kan. App. 2d 301, 303-304, 564 P.2d 552, *rev. denied* 221 Kan. 757 (1977).

⁴ K.S.A. 44-534a.

⁵ K.S.A. 2007 Supp. 44-555c(k).

IT IS SO ORDERED.

Dated this 31st day of December 2008.

HONORABLE DAVID A. SHUFELT
BOARD MEMBER

c: John Carmichael, Attorney for Claimant
Jeff Bloskey, Attorney for Respondent and Federal Insurance Co.
Bruce Wendel, Attorney for Liberty Mutual Fire Ins. Co.
Nelsonna Potts Barnes, Administrative Law Judge